IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.14 OF 2007
IN
NOTICE OF MOTION NO.685 OF 2005
IN
SUIT NO.3228 OF 2001

Caribjet Inc.,
a company incorporated under
the laws of Antigua and
having one of its offices
at P.O.Box 1301, 60 Nevi's
Street, St. John's Antique
(West Indies). .... Appellant

- Versus -

Air India Limited,
a company incorporated under
the provisions of the
Companies Act, 1956 and
having its head office
at Air India Building,
Nariman Point, Mumbai
400 021. .... Respondent

Sarvasri Virag Tulzapurkar with P.A. Kabadi
i/b M/s. Doijode Associates for the
Appellant.

Shri Kevic Setalvad i/b M/s. Mulla & Mulla
& C.B.C. for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: FEBRUARY 28, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Admit. The respondent waives service. By consent, heard forthwith.

2. This appeal arises from the order dated 15-6-2006

passed in Notice of Motion No.685 of 2005 in Suit No.3228 of 2001. By the impugned order, the Notice of Motion which was taken out by the appellant has been dismissed. The said Notice of Motion was taken out by the appellant for an order referring the parties to arbitration in respect of the suit claim on the basis of the provisions of Article 7 r/w Articles of Wet Lease Agreement dated 22-10-1995 which was executed between the parties. The learned single Judge has held that Article 11 has ceased to be operative after the obligation to pay rent under the agreement had been terminated and had been replaced by a liability to pay damages.

3. The parties to the proceedings had entered into a Wet Lease Agreement dated 22-10-1995 and the Article 7 thereof related to arbitration. Consequent to termination of the agreement by the respondent on 4-9-1996, the appellant sought to refer the dispute to arbitration on 7-1-1997. The Arbitral Tribunal by its award dated 19-1-1999 ruled that the termination was wrongful. The respondent’s application for leave to appeal was rejected. Under the Quantum Award passed in London, the respondent was found liable to pay to the appellant a sum of US$ 23,634,581.00 as on 15-11-1999. The appellant moved the Court in England on 6-12-1999 for enforcement of the said Quantum Award. On

16-12-1999 the respondent filed an application to the Reserve Bank of India for payment of the said sum of US$ 23,634,581.00. The Reserve Bank of India gave permission to the respondent under its order dated 21-12-1999 subject to obtaining NOC from the Income-Tax Department. On 21-12-1999, accordingly, the respondent applied to the Deputy Commissioner of Income-Tax for the necessary NOC. Under the letter dated 30-12-1999 the Income-Tax Department directed the respondent to deposit the said sum of US$ 23,634,581.00 in the Government treasury. On 20-1-2000 the London Court stayed the enforcement of the said Quantum Award on the condition that the respondent opens an escrow account with a Bank in London and deposits a sum of US$ 21.6 million. The Court thereupon referred the dispute as to the claim of the respondent that in view of Clause 11.1 of the said Agreement, it was entitled to deposit the said sum of US$ 21.6 million in Government treasury and obtain a discharge in respect thereof, to the Arbitral Tribunal. On 9-2-2000 the Deputy Commissioner of Income-Tax directed the respondent not to remit any monies to the appellant or to deposit monies in the escrow account or any other account in India and also provisionally attached the said amount payable under the said Quantum Award. However, on 14-2-2000, in compliance of the said order dated 20-1-2000, the respondent deposited sum of US$ 21.6 million in an escrow account. On 27-3-2000 the

Deputy Commissioner of Income-Tax called upon the respondent to pay the amount allegedly payable by the appellant, amounting to US$ 28.22 million and prohibited the respondent from making payment of any sums even in future to the appellant. On 22-5-2000 the Arbitral Tribunal passed an order holding that in view of the repudiation of the Wet Lease Agreement, the respondent was not entitled to deduct any amount from the award or pay the same to the income-tax authorities. On 19-7-2000 the respondent applied for leave to appeal from the said order dated 22-5-2000 in the Commercial Court in England which was refused and the appellant's Motion for an order instructing the monies in the escrow to be held solely for the benefit of the appellant was allowed. On 28-7-2000 the income-tax authorities issued notice to the respondent under Section 210 of the Income-Tax Act, 1961 to show cause why penalty should not be imposed on it for non-payment of tax demanded. On 29-9-2000 the respondent deposited a sum of Rs.10,46,52,267/- with the income-tax authorities towards the tax deducted at source by the Arbitral Tribunal. On 14-2-2001 an order was passed by the Deputy Commissioner of Income-Tax treating the respondent as an "assessee in default" for not having deducted tax at source on the said sum of US$ 21.6 million. On 19-2-2001 the Deputy Commissioner of Income-Tax addressed notice to the respondent to pay tax

on the said Quantum Award, treating the respondent as an "assessee in default". On 15-3-2001 the Deputy Commissioner of Income-Tax issued a show cause notice to the respondent as to why it should not be treated as an "agent of the appellant". The respondent filed an appeal before the Commissioner of Income-Tax against the order dated 14-2-2001 which was dismissed as being not maintainable. On 20-7-2001 the present Suit came to be filed wherein the appellant took out the above referred Notice of Motion and the same came to be dismissed by the impugned order dated 15-6-2006.

4. The challenge to the impugned order is two-fold: firstly, that the impugned order is contrary to law laid down by the Apex Court in **Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. and another,** reported in (2005) 7 SCC 234 in as much as before holding that the arbitral agreement between the parties to be not enforceable, no opportunity was given to the appellant to lead necessary evidence to decide the said issue about the validity and subsistence of the arbitral agreement in relation to the issue which is sought to be raised in the Suit, and secondly, that the learned single Judge failed to appreciate that the arbitration clause is an independent agreement and Clause 11.1 of the said Wet Lease Agreement comprises of two distinct parts viz., deduction of tax from the payments to be made i.e.,

withholding tax and respective liability of the appellant and the respondent to bear the tax levied other than in respect of withholding tax.

5. Upon hearing the learned counsel for the parties and on perusal of the records, the first point which arises for consideration is whether the Court is required to give opportunity to lead evidence to the parties once the Court prima facie finds no scope for reference of the matter to arbitration, either on account of the agreement being null and void or in-operative or incapable of being performed, while dealing with the matter under Section 45 of the Arbitration and Conciliation Act, 1996, hereinafter called as "the said Act".

6. As rightly submitted by the learned counsel for the appellant, the issue which is sought to be raised is no more res integra and has been well-settled by the decision of the Apex Court in **Shin-Etsu Chemical Company's** case (supra). By a majority decision in the said case, the Apex Court has held that:

> "if on a prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by

one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in a regular civil suit and pass an elaborate

> reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this Court under sub-section (2) of the said section."

7. Apparently, the Apex Court has in clear terms ruled that when the party raises an issue as regards the validity of the agreement in an application under Section 45 of the said Act, if the Court prima facie on the basis of the materials placed in support of contention is inclined to reject the request for reference, then the Court has to afford full opportunities to the parties to lead documentary as well as oral evidence which they want to lead in relation to the validity or in-operativeness or incapability of performance of the agreement and then decide the question like a trial of a preliminary issue on jurisdiction or limitation in a regular Suit. The learned single Judge, however, held that in **Shin-Etsu Chemical Company's** case the Apex Court has held that on

a primary examination of the documents and materials on record including the arbitration agreement, the Court can reject the request for reference on the ground that the agreement is null and void or in-operative or incapable of being performed within the meaning of Section 45 of the said Act. Undoubtedly, that was the ruling by one of the Hon'ble Judges of the Apex Court in the said matter. However, by a majority it was ruled otherwise.

8. It is not in dispute that the learned single Judge did not afford any opportunity to the parties to lead any evidence in support of their rival contentions regarding the validity of the agreement or of its enforceability or unenforceability. As the objection directly related to the claim based on Clause 11.1 of the Wet Lease Agreement, and on that count the appellant herein having requested for a reference of the matter for arbitration, it was necessary for the learned single Judge to afford an opportunity to the parties to place on record whatever materials they desire to produce before discharging the Notice of Motion. However, in the absence of such an exercise being done, the Notice of Motion taken out under Section 45 of the said Act could not have been disposed of.

9. As the other point which is sought to be raised

relates to the merits of the case, it is too premature to deal with the said point; and it would amount to putting the cart before the horse. Being so, we are left with no alternative than to set aside the impugned order and remand the matter to the learned single Judge to give an opportunity to the parties to place on record whatever materials they want to produce in support of their rival contentions while dealing with the Notice of Motion taken out by the appellant in terms of Section 45 of the said Act and to deal with the same bearing in mind the law laid down by the Apex Court in **Shin-Etsu Chemical Company's** case. The appeal is accordingly allowed in above terms, with no order as to costs.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

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